No. 2529.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

R. C. WOOD, et al.,

Appellants,

vs.

F. G. NOYES, Receiver, etc.,

Appellee.

PETITION FOR REHEARING

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FILED
NOV 7 - 1917
F. D. MONCKTON,

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

R. C. WOOD, JOHN L. McGINN and J. A. JESSON, *Appellants,* vs. F. G. NOYES, as Receiver of the Washington-Alaska Bank, a corporation organized under the laws of the State of Nevada, *Appellee.*	No. 2529.

PETITION FOR REHEARING.

We ask for a rehearing in this case for the following reasons:

1. That it is plainly apparent from the opinion filed herein,

   (a) That the Court has misconceived what issues were covered by the findings and
   (b) That the Court has overlooked the admissions made by the appellee in its reply.

2. That the Court below has no jurisdiction of the subject matter.

3. That the complaint did not state a cause of action.

I.

The Court in its opinion says:

> "the findings covered the material issues made by the pleadings and upon the record we cannot hold that the evidence was insufficient to justify the findings made or that the Court below erred in refusing to make the numerous findings requested by the appellants."

We submit that in this statement the Court is in error. There was no finding by the lower Court on the issues raised by the answer and reply as to the defenses of accord and satisfaction and full or partial satisfaction of the wrong complained of.

This Court in its opinion likewise failed to pass upon these issues, the Court in this respect saying:

> "the other defenses referred to were on appeal (Cause 2528) from the judgment there given by the trial Court held by this Court at the last term to be of no avail so that no further reference to those defenses need now be made."

It is true that in Cause No. 2528 this Court passed upon the defense of accord and satisfaction as presented by the appellants, but it failed to pass upon the other defense urged by them that if said agreement between Barnette and the receiver did not constitute an accord and satisfaction, nevertheless it did

constitute a covenant not to sue, and that any thing received by the receiver in consideration of his covenant not to sue Barnette either permanently or for a limited time, should be applied in reduction of the liability of his joint *tort feasors.*

Furthermore, the Court in said Cause 2528 *did not pass upon the question* that is presented by the facts admitted by the pleadings in *this* case.

The defense of the appellants in Cause 2528 that the agreements between Barnette and the receiver constituted an accord and satisfaction and thereby operated as a release of Barnette, was held by this Court to be of no avail in that case upon the assumption that the facts therein showed that

> "he (Barnette) stipulated in his deed that the receivers were not to take possession of the property conveyed nor the rents, issues or profits thereof, nor had any right to the possession or use thereof at any time prior to November 18, 1914. The receivers considered that their acceptance of the conveyance obligated them not to sue Barnette before November 18, 1914, and the appellee so pleaded its effect in the reply."

We contended in our petition for a re-hearing in Cause 2528 that this Court was in error as to what the record disclosed in this respect; that this Court had inadvertently fallen into an error in assuming that the trust deeds were identical in their provisions; that as to the property transferred by the Mexican deed this Court's position as to the right of the re-

ceiver to possession was correct; but that as to the Alaska property it was expressly provided in that deed that the receiver might take immediate possession of the same and collect the rents, issues and profits thereof and apply the same under order of the Court, in payment of the claim of creditors.

In the case at bar, however, this Court, we suggest, is foreclosed from arriving at the conclusion stated in the opinion in Cause 2528 because it is contrary to the admissions of the pleadings herein.

The allegations of the complaint herein charged that Barnette was a joint tort feasor with the appellants (Tr., 1-14).

The answer alleges that the receiver intended to bring action against Barnette to fix his liability to the creditors of the Washington-Alaska Bank; that to prevent this action he conveyed to the receivers (which the receivers accepted under order of the Court) title to certain property situated in the Republic of Mexico, and also property situated in the District of Alaska; that as to the Alaska property the receivers were entitled to and did take immediate possession and receive and collect the rents, issues and royalties derived therefrom, and were entitled to distribute the same to the creditors of said Washington-Alaska Bank under order of Court (Tr., 21-28).

The plaintiff in reply to these allegations of the answer (Tr., 32-3) says:

"Sixth. He admits the conveyance to the former

> receivers herein of *title* to the property referred to in said answer and that he *has taken possession* thereunder of the property therein described and located in the Territory of Alaska.
>
> "Seventh. He admits that he has received the rents, royalties and issues of said property situated in the Territory of Alaska, and he alleges that the net amount thereof so received by him up to June 1st, 1914, is approximately $31,478.65 less such reasonable charge as may be allowed for the collection thereof, as provided in said conveyance."

These admissions of the plaintiff are in direct opposition to the finding of this Court, stated in its opinion in Cause 2528 that

> "he (Barnette), stipulated in his deed that the receivers were not to take possession of the property conveyed, nor the rents, issues or profits thereof, nor had any right to the possession or use thereof at any time prior to November 18, 1914."

These admissions in the pleadings in the case at bar therefore present a legal issue that was not passed upon by this Court in its opinion in Cause 2528.

The Court also based its opinion in Cause 2528 upon the statement,

> "that the receivers considered that their acceptance of the conveyance obligated them not to sue Barnette before November 18, 1914, and the appellee so pleaded its effect in the reply."

No such allegation is found in the reply of the plaintiff in this case.

This admission of the plaintiff that he received *title*

and *possession* of the Alaska property and that by virtue of said title and possession *he has received approximately the sum of $31,478.65,* makes this sum so received by him absolutely the money of the receivership. It was on account of the joint wrong doings, if any, of Barnette and these appellants that the receiver obtained this property and money.

Is it conceivable that money so received from one joint tort feasor is not to be applied in full or partial reduction of the liability of the other joint tort feasors? To so hold is to maintain that there can be many duplicate recoveries from joint tort feasors for the same wrong; contrary to the doctrine of all of the authorities on this subject and the decisions of this court.

> "In cases of joint torts, the injured person may sue one, or any number less than all of the joint *tort feasors,* or may sue all; and, where there is but one injury, there can be but one satisfaction."

> *Tanana Trading Co.* v. *North American T. & T. Co.,* 220 Fed. Rep. 786 (Ninth Circuit, C. C. A.).

II.

The District Court of Alaska had no jurisdiction to appoint a receiver in the case of *Tanana Valley Railroad and John Zug* v. *Washington-Alaska Bank,* and thereby authorize him to institute this action.

The appellants contend that the plaintiff had no right to maintain this action upon the grounds,

that not only does the complaint fail to show any cause of action in him but also that the Court was and is without jurisdiction of the subject matter of this action and that all of its acts in this proceeding are null and void.

Objection was made in the lower Court by demurrer that the complaint did not state facts sufficient to constitute a cause of action which demurrer was overruled but irrespective of this "the objection to the jurisdiction of the Court and the objection that the complaint does not state facts sufficient to constitute a cause of action," even if no objection thereto be taken by demurrer or answer in the lower Court is not waived (Carter Code, Alaska, p. 157), and may be raised at any stage of the proceedings.

The right of the plaintiff to maintain this action depends entirely upon his right and status as receiver of the Washington-Alaska Bank, and this right and status is not alone dependent upon the order of the Court appointing him but also upon the power of the Court to make that order.

The complaint discloses that the Washington-Alaska Bank is a corporation organized and existing under the laws of the State of Nevada (Tr., 3), and was engaged in banking in the town of Fairbanks, Alaska, and alleges (Tr., 9) that:

> "on January 5th, 1911, in a certain suit entitled *'Tanana Valley Railroad Company, a corporation, and John Zug, plaintiff,* v. *Washington-Alaska*

> *Bank, a corporation, defendant,'* commenced in said District Court, Territory of Alaska, Fourth Division, an order was duly given and made appointing F. W. Hawkins receiver of said Washington-Alaska Bank, who thereupon duly qualified and entered upon his duties as such receiver. Thereafter, on the 6th day of January, 1911, said District Court by an order duly given and made appointed E. H. Mack jointly with said Hawkins, receiver of said Washington-Alaska Bank, and said Mack thereupon duly qualified and entered upon his duties as such receiver; and thereafter said Hawkins and Mack continued to be and act as receivers of said Washington-Alaska Bank until the 12th day of May, 1911, when said Hawkins and Mack resigned as such receivers, and thereupon on said date last named said District Court, by an order duly given and made and entered appointed the plaintiff F. G. Noyes, receiver of said Washington-Alaska Bank, and said F. G. Noyes thereupon duly qualified as such receiver and ever since has been, and now is the duly qualified and acting receiver of the said Washington-Alaska Bank, and as such is plaintiff in this suit."

The appointment and qualification of the plaintiff herein as receiver was denied in the answer of appellants (Tr., p. 17), and no finding was made by the Court on that subject.

The nature of the suit of *Tanana Valley Railroad Company and John Zug* v. *Washington-Alaska Bank,* whether at law or in equity does not appear, nor is it shown what was the character of the relief sought to be obtained, nor the rights or functions of the receiver.

In any event the appointment was made either by virtue of the chancery powers of the Court or by virtue of the Alaska statute.

The entire statutory law of Alaska in regard to receivers is found in Chapter 77, part IV, page 300, of Carter's Annotated Code of Alaska.

Section 753 thereof provides:

> "A receiver may be appointed in any civil action or proceeding other than an action for the recovery of specific personal property . . .
> "Fourth. *In cases provided in this Code* or by other statute when a corporation has been dissolved or is insolvent or in imminent danger of insolvency, or has forfeited its corporate rights."

The cases provided in this code are:

> "First. Provisionally, before judgment, on the application of either party, when his right to the property which is the subject of the action, or proceeding, and which is in the possession of an adverse party, is probable, and the property or its rents or profits are in danger of being lost or materially injured or impaired;
> "Second. After judgment, to carry the same into effect;
> "Third. To dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied, and the debtor refuses to apply his property in satisfaction of the judgment or decree; . . .
> "Fifth. In the cases when a debtor has been declared insolvent."

These are the only cases where by the Code or by statute a receiver may be appointed in Alaska. It is clear, therefore, that under these statutory provisions the Court was without jurisdiction to appoint and confer upon a receiver authority to institute a suit against the stockholders of the Washington-Alaska Bank to recover a part of the capital of said Bank alleged to have been wrongfully paid them.

We must therefore look to the chancery powers of the Alaska Court.

It is a grave question whether under any circumstances a Court of equity has the power under its general chancery jurisdiction to appoint a receiver of a corporation to wind up its affairs. There is abundant authority to the effect that that cannot be done even in the case of domestic corporations.

But it is not necessary to go into that question here, because in any event regardless of its powers over domestic corporations, there can be no question that a Court of equity cannot appoint a receiver for a foreign corporation or over its assets where the effect would be tantamount to a winding up of the corporation.

THE ALASKA COURT HAD NO JURISDICTION TO APPOINT A RECEIVER FOR A CORPORATION ORGANIZED UNDER THE LAWS OF ANOTHER STATE.

It is our contention that the Court of Alaska under its general chancery powers had no jurisdiction to appoint a receiver to liquidate or wind up the affairs of the foreign corporation and that the utmost of its powers was to appoint a receiver ancillary to an actual pending suit whose authority is limited to receive and preserve the property *pendente lite*.

There is an essential difference between an ordinary receiver in chancery and a statutory receiver appointed to wind up the affairs of an insolvent or dissolved corporation. The distinctive feature of an ordinary chancery receiver is that he is a mere custodian.

> "A chancery receiver is an indifferent person appointed by the Court to hold property in litigation pending suit. He is a ministerial officer with the functions of a custodian. He derives his authority from the Court and not from the parties at whose instance he is appointed. He acts in behalf of no particular interest and guards the rights of all. Being a mere holder his appointment does not change the title of the property nor alter any lien or contract."

Penn. Steel Co. v. *N. Y. C. R.,* 198 Fed. 728;
Booth v. *Clarke,* 17 How. 322;
Quincy etc. v. *Humphreys,* 145 U. S. 82;
Union Bank v. *Kansas Bank,* 136 U. S. 223;
Gaither v. *Stockbridge,* 67 Md. 222;

Atlantic Trust Co. v. *Chapman,* 208 U. S. 360;
Fowler v. *Osgood,* 141 Fed. 20;
Covell v. *Fowler,* 144 Fed. 335;
Edwards v. *N. A. T. W. Co.,* 139 Fed. 795;
Maguire v. *Mortgage Co. of America,* 203 Fed. 858;

Decker v. *Gardner,* (N. Y.), 11 L. R. A. 480;

5 Thomp. Cor., Sec. 6396.

As said by the Supreme Court of the United States, in *Railroad Co.* v. *Humphreys,* 145 U. S., 82, 12 Sup. Ct., 787, speaking of the Wabash receivers:

> "They were ministerial officers, appointed by the Court of chancery to take possession of and preserve, *pendente lite,* the fund or property in litigation; mere custodians coming within the rules stated in *Union Bank of Chicago* v. *Kansas City Bank,* 136 U. S. 223, 236, 10 Sup. Ct. 1013, where this Court said: 'A receiver derives his authority from the act of the Court appointing him, and not from the act of the parties at whose suggestion or by whose consent he is appointed; and the utmost effect of his appointment is to put the property from that time into his custody as an officer of the Court, for the benefit of the party ultimately proved to be entitled, but not to change the title or even the right of possession in the property.'"

> "A mere Court receiver unlike a statutory receiver is not vested with the title to property, but it remains in those for whose benefit he held it. He is clothed with no estate in the property, but is mere custodian of it for the Court, nor in a

legal sense is the property in his possession. It is in the possession of the Court by him as its officer."

10 *Enc. of U. S. Sup. Ct. Rep.*, 546.

"A chancery receiver is a receiver *pendente lite* and does not take title and hence differs from a statutory receiver, who is practically an assignee."

Cook on Corp. (7 ed., sec. 866, p. 3322.)

In the case of *Farmers' Loan and Trust Co.* v. *O. R. R. Co.,* 48 Pac. 706, the Supreme Court of Oregon—the laws of which State were extended by Congress to Alaska and were in force when the said receiver was appointed—says:

". . . A receiver represents no particular interest or class of interests. He holds for the benefit of all who may ultimately show an interest in the property. He stands no more for the creditor than the owner. They are not assignees. . . ."

In the case of *Hilliker* v. *Hale,* 117 Fed. 220, the Court of Appeals for the Second Circuit, said:

"We are further of the opinion that the plaintiff cannot maintain this action. He sues as receiver. His rights, if any, rest wholly upon the order and decree in the Rogers case. Without regard to the nature of the claim asserted against the defendant, the plaintiff has no relation to that claim otherwise than through such order and decree. He is not the assignee of all or any of the creditors. He has no title to anything so far as appears, except to his office as receiver. The order and decree, in terms, makes him a mere agent of

the Minnesota Court. That Court undertook to authorize him to sue nonresidents in other jurisdictions; moneys collected to be 'held by him subject to the further order of this Court (the Minnesota Court) in the premises.' The Minnesota Court thus attempted to send its agent to collect money by suit outside of its jurisdiction, and to bring it back to be disposed of as it might direct. If it had had power to transfer the claim against the defendant to the plaintiff, and had in fact so transferred it, he could assert the title this acquired, and sue upon such claim here, in accordance with the principles stated in *Association* v. *Rundle,* 103 U. S. 222, 26 L. Ed. 337. Apparently the Court had no such power. Whether it had or not, it did not attempt to exercize it. It transferred nothing to the plaintiff. It merely appointed him its own agent to collect and hold subject to its order."

The rule sustained by the authorities is that the courts of one State have no jurisdiction to appoint a receiver for a corporation organized under the laws of another State, but that a receiver may be appointed for the assets of the foreign corporation which are within the particular State where the action is brought, and these may be subjected to the claims of creditors.

Pacific Coast Coa. Co. v. *Esary* (Wash.), 148 Pac. 579;

3 *Clark & Marshall,* Private Corp., p. 2756;

5 *Thompson Corp.* (2nd Ed.), Sec. 6332;

Stafford & Co. v. *American Mills Co.,* 13 R. I. 310;

Leary v. *Columbia River etc. Co.,* 82 Fed. 775;

Sidway v. *Missouri, etc., Co.*, 101 Fed. 481;
Hutchinson v. *American Palace Car Co.*, 104 Fed. 182;
5 *Thomp.*, Sec. 6332.

THE DISTRICT COURT OF ALASKA COULD HAVE NO POWER TO DISSOLVE OR WIND UP THE AFFAIRS OF A FOREIGN CORPORATION.

A Court of equity has no jurisdiction whatever to dissolve or wind up a foreign croporation.

3 *Clark & Marshall*, Priv. Cor., p. 275.

The general rule is that the general jurisdiction of equity over corporations does not extend to the powers of dissolution of the corporation or the winding up of its affairs.

"It is hardly necessary to remark that if Courts of equity, at the suit of a shareholder, and in the absence of a statute, have no jurisdiction to dissolve a domestic corporation, and to wind up its affairs, much less can they exercise such powers with respect to a foreign corporation. It has, indeed, been held on much consideration that the Courts of a State have no visitorial powers over foreign corporations doing business within the State, unless such power is expressly conferred by local statutes; and for that reason it was ruled by the Supreme Court of Maryland that it would not entertain a proceeding by a citizen of Maryland, who was a shareholder in a foreign company, to compel it to annul an alleged wrongful forfeiture of his stock, and to reinstate him as a stockholder. *Mining Co.*

v. *Field,* 64 Md. 151; 20 Atl. 1039. See, also, *Wilkins* v. *Thorne,* 60 Md. 253."

Republican Mountain Silver Mines v. *Brown,* 58 Fed. Rep. 644-8;

Georgia v. *Locke,* 50th Ala. 332.

In *Conklins* v. *U. S. Shipbuilding Co.,* 140 Fed. 220, the Court said:

"It is well settled that a Court of equity independent of statutory authority cannot decree the dissolution of a corporation."

N. J. L. R. Co. v. *Commissioners,* 39 N. J. Law, 28;

Morawetz Priv. Cor., sec. 1040;

Thomp. on Cor., secs. 4538, 6598 and 6854.

The general powers of a Court of equity do not therefore extend to the appointment of a receiver of the corporation, except in the State from which the corporation derives its corporate existence.

A general receiver of a corporation is for all purposes the corporation itself, and there devolves upon him by operation of law the rights of action which are the property of the corporation, but such a receiver of a Nevada corporation the Alaska Court was without jurisdiction to appoint. It might have appointed a receiver in an ancillary proceeding who would represent a general receiver had there been such a one, and who as his representative could main-

tain and enforce rights of action in his favor, but no such state of affairs appears here.

The Court being without jurisdiction to appoint the receiver originally and authorize him to institute this action, the entire proceeding is void.

In *Murray* v. *American Surety Company*, 70 Fed. 339, this Court held that a receiver of a bank appointed by the Superior Court of California in a proceeding where such appointment could not properly be made had no right to maintain a suit on bonds given by officers of the bank to indemnify it against pecuniary loss caused by the dishonesty of its president or cashier, and that the entire proceeding was void and subject to collateral attack.

III.

THE COMPLAINT DOES NOT STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION.

The gist of the plaintiff's complaint is that the defendants were stockholders of a Nevada corporation and received money from it by way of a dividend which the Board of Directors had improperly declared; that these defendants received this dividend with knowledge on their part that it was unlawfully declared.

Assuming for the sake of argument that these facts pleaded state a cause of action in favor of someone, there is nothing in the complaint to show that that cause of action is in favor of the plaintiff. In order

for him to state a cause of action he must show the right of action in himself. Inasmuch as the cause of action originally accrued to someone else, namely, the corporation or its creditors, it was incumbent upon the plaintiff as a part of his case to show that that right of action had devolved upon him, either by operation of law or by assignment, or by some other mode.

> "It is incumbent upon the plaintiff to allege sufficient facts to show that he is concerned with the cause of action averred, and is the party who has suffered injury by reason of the act of the defendant. In other words, it is not enough that he alleges a cause of action existing in favor of some one; he must show that it exists in favor of himself."
>
> 31 Cyc. 102, and cases cited.

> "The burden should not be placed upon defendant to show that plaintiff is not the aggrieved party and that he has sustained no damages."
>
> 31 Cyc. 103;
> *Rayner* v. *Clark*, 7 Barb. (N. Y.), 581.

> "It is also necessary to allege facts showing that the cause of action alleged accrued to him in the capacity in which he sues and for this purpose it is necessary to allege his authority."
>
> 31 Cyc. 103, and cases cited.
> *Holliday* v. *Davis*, 5 Or. 40;
> *Smith on Receivers*, sec. 71;

Simmons v. *Taylor,* 106 Tenn. 729;
High on Receivers, sec. 201.

There is nothing in the complaint whatever to show any right upon the part of the plaintiff. There is nothing but a naked allegation that an action was commenced, entitled *"Tanana Railway Co.* v. *Washington-Alaska Bank,"* and that in that action the plaintiff was appointed a receiver of the Bank. There is nothing to show the character of the action or the purpose of the receivership, or the functions or powers of the receiver; nothing, in fact, to show in what manner a receiver appointed in that action could become entitled to maintain this or any other action. Presumably the action of the *Tanana Railway Co.* v. *Washington-Alaska Bank* was an action of which the Alaska Court had jurisdiction. If that were the case the only receiver which it could appoint would be one to take the custody of assets of the bank and hold them *pendente lite* subject to the order of the Court. If he were entitled to bring an action in his own name upon claims due the Bank, something must be shown which vested the title to such choses in action in the receiver. There is absolutely nothing in the complaint to show such right, and without allegations covering it the complaint does not state a cause of action.

The fact that one alleges that he is the "receiver" of a corporation conveys no information as to his power or authority. This was a foreign corporation.

The control which the Alaska Court could exercise over its affairs was limited in the extreme.

It could not interfere in the internal affairs of the corporation.

> *Richardson* v. *Clinton Wall Trunk Mfg. Co.*, 181 Mass., 580, 64 N. E., 400;
> *Beale on Foreign Corporations,* secs. 300 et seq.

It could only exercise such powers as were directly related to the objects of the action which was pending before it, in which the order was made which appointed the plaintiff "receiver."

What was the action?

It may have been a creditor's bill seeking to subject the property of the bank to some judgment. Perhaps it was a stockholders' suit seeking to have the corporation wound up. Perhaps the plaintiffs claimed to be partners with the defendant in the bank and sought a dissolution, or maybe the case was simply a foreclosure suit in which the plaintiff asked for a receiver of the mortgaged property.

In each of these cases the objects, duties and powers of a receiver would be different, and it was incumbent upon the plaintiff to show the character of his receivership, and unless his complaint showed that he was appointed receiver in some proceeding whose objects and purposes had some conceivable connection with the purpose of the case at bar he failed to state a cause of action.

There is absolutely nothing in the complaint from which these facts can be ascertained.

Suppose no receiver had been appointed, in whom would have been the right of action in the absence of special statutory authority?

The only persons who, by any possibility, could maintain such an action as this would be the creditors of the corporation. For them to maintain any action looking to the preservation of the assets of the corporation, it would be necessary for them to show either that the corporation was insolvent or that it was in danger of insolvency. But a Court taking jurisdiction of such an action in a foreign State would have to be shown that such action was necessary for the protection of the rights of the creditors and its jurisdiction would be limited to the collection of such assets as were within its jurisdiction and possibly the distribution of them among the creditors whom it found entitled thereto. It would have no right or authority to take any steps looking to the winding up of the corporation, that being a matter entirely within the jurisdiction of the State under whose laws the corporation was created.

Now it does not appear from the record in this case by what right the plaintiff maintains this action. There is nothing in the record to show with what powers the receiver was clothed or anything to show any instruction or permission of the Court which ap-

pointed him that could be made the foundation for his authority to commence this suit.

We respectfully submit that without allegations to cover these matters the complaint cannot state a cause of action.

34 Cyc. 436.

A CAUSE OF ACTION IS NOT STATED BECAUSE A RECEIVER CANNOT SUE IN HIS OWN NAME.

All the authorities agree that under the general chancery procedure, as it exists in this country without statutory modification, a receiver as such has no authority to institute a suit for the recovery of property which he has failed to reduce to *possession,* unless by order or leave of the Court who appointed him.

Even then the action must be brought in the name of the party in whom the legal right or title to the property is vested. The receiver is regarded as a mere custodian, and not as having any legal right to the property. He is not the trustee of any express trust, but is an officer of the Court appointed for the safe keeping of money or property, which the Court itself has taken in charge for ultimate distribution among those who may be entitled according to their several and respective rights, as finally developed in the cause.

Yeager v. *Wallace,* 44 Pa. St. 294;

King v. *Cutts,* 24 Wis. 627;
Newell v. *Fisher,* 24 Miss. 392;
Kerr on Receivers, 192;
Manlove v. *Burger,* 38 Ind. 211;
Battle v. *Davis,* 66 N. C. 252.

In New York and some other States the powers of the receiver have been enlarged by statute, especially in regard to the institution of suits in their own names, and at their own discretion, for collecting and preserving the property committed to their care. But, in the case at bar even had the Court directed the receiver to have brought this suit in his own name it would not have helped matters, for the right or title to the things sued for remained where it was before the receiver was appointed.

A receiver in the strict sense has in his capacity as receiver no such interest, either legal or equitable, in the property in his custody as entitles him to bring an action in his own name concerning it, whether at common law, in equity, or under the code.

17 Encyc. Pl. & Pr. 807, and cases cited.

It follows from what has been said that this suit was improperly brought by the receiver in his own name unless it can be shown that the proceedings were authorized by some statutory provision of Alaska. There is no such statutory provision. In fact, the Alaska

statute is to the contrary. It provides in Chapter 3, Part IV, page 149, Carter's Code, as follows:

> "Sec. 25. Action to be prosecuted in name of real party in interest. Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in section twenty-seven; but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract.
>
> "Sec. 27. Executor or administrator or trustee may sue. An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute may sue without joining with him the person for whose benefit the action is prosecuted. A person with whom, or in whose name a contract is made for the benefit of another, is a trustee of an express trust within the meaning of this section."

A receiver in whom title in the property is not vested is not a trustee of an express trust within the Code provision permitting such trustees to sue in their own names.

State v. *Gambes*, 68 Mo. 289;
Tilkus v. *Munnemacher*, 81 Wis. 91.

If a receiver sues upon a cause of action which did not vest in him, it is not necessary to interpose a demurrer questioning his capacity to sue. There is a difference between capacity to sue and a cause of action which is the right to relief in Court.

Ward v. *Price*, (N. Y.) 68 A. S. R. 790.

Assuming, however, that the plaintiff had been regularly and properly appointed and duly authorized to commence this action, we submit that it was not a proper suit to be brought by him.

This cause of action sounded *in tort.* The alleged liability of the appellants was based upon a violation of a Nevada statute, which provides, that:

> "It shall not be lawful for the *trustees* or *directors* to make any dividend except from the net profits arising from the business of the corporation; nor to divide, withdraw, nor in any way pay to the stockholders, or any of them, any part of the capital stock of the company; nor to reduce the capital stock, unless in the manner prescribed in this act, or in accordance with the provisions of the certificate or articles of incorporation; and in case of any violation of the provisions of this section, the *directors* or *trustees* under whose administration the same may have happened, except those who may have caused their dissent thereto to be entered at large on the minutes of the board of directors or trustees at the time, *shall in their individual and private capacities, be jointly and severally liable to the corporation, and the creditors thereof, to the full amount so divided, withdrawn or reduced, or paid out;* provided, that this section shall not be construed to prevent a division and distribution of the capital stock of the company which shall remain, after the payment of all its debts, upon the dissolution of the corporation or the expiration of its charter; provided, also, that this section shall not prevent the retirement or conversion of either stock or bonds or the distribution of the earnings or accumulations of the corporation as provided for in the articles

> or certificate of incorporation, original or amended."

> Act, March 16, 1903, sec. 68.

The appellants in this action are sued in their capacity *as stockholders.*

We submit that there is nothing in the Nevada law which permits a recovery against *stockholders* for receiving a part of the capital stock by way of dividends.

While under the Nevada law the *trustees* or *directors* are in their individual and private capacity made jointly and severally liable to the corporation and the creditors thereof for a dividend made out of the capital, there is no such liability placed upon the stockholders who received the same.

The capital stock of a corporation is not a *trust fund* for the benefit of its creditors. And the so-called "trust fund" doctrine of the American Courts only becomes operative upon the corporation becoming insolvent.

There is no finding that the corporation was insolvent at the time of the declaration and payment of the dividend.

In the case of *McDonald* v. *Williams,* 174 U. S. 497, the Supreme Court of the United States said:

> "The bank being solvent, although it paid its dividends out of capital, did not pay them out of a trust fund. Upon the subsequent insolvency of the bank and the appointment of a receiver, an action could not be brought by the latter to recover

the dividends thus paid on the theory that they were paid from a trust fund, and therefore were liable to be recovered back."

It will be observed that under the National Banking Act it is provided that "no *association* or *any member* " thereof shall . . . withdraw or permit to be " withdrawn either in the form of dividends or other- " wise, any portion of its capital"; while under the Nevada statute such prohibition is limited to *"directors* or *trustees."*

If under the authority of *McDonald* v. *Williams, supra,* the action was not maintainable against a stockholder even with the express statutory provision in its aid, how much less maintainable is the case at bar with the Nevada statute reading as above quoted.

Appellants respectfully urge that they be granted a rehearing of this cause for the reasons above stated.

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